IN THE
MISSOURI SUPREME COURT

Supreme Court No. SC87022

GENE R. KUNZIE,

Appellant,

v.

CITY OF OLIVETTE, MISSOURI,

Respondent.

Circuit Court For The County Of St. Louis
Cir. Ct. No. 04-CC-000386
Honorable Robert S. Cohen

Missouri Court Of Appeals, Eastern District
App. Ct. No. Ed-85119
Honorable Clifford Ahrens, Nannette Baker, Glenn Norton

BRIEF OF AMICI CURIAE

Respectfully Submitted,

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INTRODUCTION

The Missouri Municipal League, the St. Louis County Municipal League, and the Missouri School Boards' Association ("Amici") represent municipalities and school boards throughout the State of Missouri, and they submit this brief on behalf of their members and all affected local governments. Of concern to Amici in this case is the potential erosion of the doctrine of sovereign immunity and its impact on local governments.

Sovereign immunity has long protected the taxpayer-funded revenues of local governments, allowing them to deliver those governmental services that they are charged by law to fulfill. Yet in its opinion below, the Eastern District held a city would not be immune from a retaliatory discharge suit because the act of terminating the employee was a proprietary function. Amici believe this conclusion is wrong, and we accordingly urge the Court to find that such administrative decisions are inherently governmental in nature and that local governments are protected by sovereign immunity when making personnel decisions.

STATEMENT OF FACTS

Appellant alleged that he was the City's Director of Public Works and Building Commissioner and an at-will employee of the City. Appellant did not articulate the duties of his employment, but he alleged that the City was responsible for being in compliance with accessibility requirements with respect to the disabled, maintaining roadways within its boundaries, and being in compliance with the City's employee handbook and safety manual. Appellant further alleged that in the course of his employment he disclosed to

the Olivette City Manager and the City Council that certain public buildings were not accessible to the disabled as required by law, that a city bridge had deteriorated and posed a danger to the traveling public, and that a city backhoe was in disrepair and unsafe. According to the appellant, the City terminated his employment in retaliation for raising the noted compliance issues.

POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S RETALIATORY DISCHARGE CLAIM BECAUSE IT FAILED TO STATE A CAUSE OF ACTION IN THAT THE CITY WAS ACTING IN ITS GOVERNMENTAL CAPACITY AND WAS PROTECTED FROM SUIT BY SOVEREIGN IMMUNITY.

State ex rel. Gallagher v. Kansas City, 7 S.W.2d 357 (Mo. banc 1928)

Nichols v. City of Kirksville, 68 F.3d 245 (8th Cir. 1995)

Aiello v. St. Louis Community College District, 830 S.W.2d 556 (Mo. App. 1992)

Donahew v. City of Kansas City, 38 S.W. 571 (Mo. 1897)

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S RETALIATORY DISCHARGE CLAIM BECAUSE IT FAILED TO STATE A CAUSE OF ACTION IN THAT THE CITY WAS ACTING IN ITS GOVERNMENTAL CAPACITY AND WAS PROTECTED FROM SUIT BY SOVEREIGN IMMUNITY.

Standard of Review

On review of a dismissal for failure to state a claim, an appellate court must determine if the facts pleaded and the reasonable inferences therefrom entitle the plaintiff to any relief according to the dictates of substantive law. Theodoro v. City of Herculaneum, 879 S.W.2d 755, 759 (Mo. App. 1994). As applied in this case, because the liability of a public entity for torts is the exception to the general rule of sovereign immunity, a plaintiff must specifically plead facts demonstrating that the claim is beyond the protection of the doctrine. Hummel v. St. Charles City R-3 School Dist., 114 S.W.3d 282, 284 (Mo. App. 2003).

Argument

Although the Appellant sued the City for wrongful discharge in tort, claiming "whistleblower" retaliation under the public policy exception to the employment-at-will doctrine,[1] the Appellant's petition fails to establish that the City acted in a proprietary capacity in discharging him. As such the City was protected by sovereign immunity, and the trial court did not err in dismissing Appellant's wrongful discharge claim.

A. Scope of the Issue Presented

Under the common law, the state and its political subdivisions were wholly immune from suit for tort claims. This complete immunity, however, did not apply to municipalities. Their immunity was limited, because they were deemed to exercise both

[1] See *Boyle v. Vista Eyeware, Inc*, 700 S.W.2d 859, 878 (Mo. App. 1985)(whistle-blower claim constitutes a "cause of action in tort for damages for wrongful discharge").

governmental and proprietary functions. To the extent a municipality acted for the common good of all, i.e., in its "governmental" capacity, it was immune from suit. If the municipality acted as a corporate entity for its own special benefit or profit, it acted in its "proprietary" capacity and was not immune from suit. Wollard v. City of Kansas City, 831 S.W.2d 200, 202 (Mo. banc 1992); Jungerman v. City of Raytown, 925 S.W.2d 202, 204 (Mo. banc 1996).

In 1977 this Court abrogated the common law doctrine of sovereign immunity, but the Missouri legislature responded shortly thereafter by enacting Sections 537.600 and 537.610 of the Revised Statutes of Missouri. Wollard, *id.*[2] Section 537.600 reestablished the doctrine as it existed under the common law, thus leaving intact the traditional proprietary-governmental litmus test. In addition, the statute carved out two exceptions to the doctrine. Immunity was waived as to liability for injury resulting from the negligent operation of motor vehicles and from the dangerous condition of property, regardless of whether the political entity was acting in a governmental or proprietary capacity. Wollard, *id.*; §537.600.2, RSMo.

Section 537.610 provided a third exception to the sovereign immunity doctrine. The statute authorized the state and its political subdivisions to purchase liability

[2] Sections 537.600 and 537.610 apply to municipalities. See Browning by Browning v. White, 940 S.W.2d 914 (Mo. App. 1997); State ex rel. City of Marston v. Mann, 921 S.W.2d 100 (Mo. App. 1996).

insurance for tort claims, and it waived sovereign immunity to the extent of insurance coverage so purchased. §537.610.1, RSMo.[3]

Accordingly, to establish a retaliatory discharge tort claim against a municipality, a plaintiff must establish injury resulting from either (a) an act of the municipality undertaken in its proprietary capacity, or (b) one of the express waivers of sovereign immunity under Section 537.100 (negligent operation of motor vehicles or dangerous condition of property), or (c) an insured governmental function of the municipality. In that Amici are concerned solely with the Court's application of the governmental-proprietary test to personnel decisions, we will address only the proprietary exception.

B. The Proprietary Exception

In Jungerman v. City of Raytown, 925 S.W.2d 202 (Mo. banc 1996), this Court acknowledged the traditional governmental-proprietary standard in determining the application of immunity. The Court noted that a city was immune from tort claims when performing governmental functions "for the common good of all," while it was not immune from tort while acting in a proprietary capacity "for the special benefit or profit of the municipality acting as a corporate entity." Jungerman, 925 S.W.2d at 204. The Appellant's pleadings establish that the City of Olivette executed a personnel decision in the administration of its public works department operations. Existing Missouri law

[3] Similarly, Section 71.185, RSMo. authorizes municipalities engaged in governmental functions to purchase liability insurance for torts resulting in personal injury and property damage, to the extent of the insurance so purchased. §71.185.1.

establishes that personnel decisions, and the internal administration of an operating municipal department, are inherently governmental.

1. Terminating an Employee is a Governmental Function.

Missouri case law establishes that terminating an employee, even an employee engaged in a proprietary activity, is a function inherently governmental in nature.

In State ex rel. Gallagher v. Kansas City, 7 S.W.2d 357 (Mo. banc 1928), a city water meter reader filed a wrongful discharge action seeking reinstatement and back pay. This Court affirmed the judgment rendered in favor of the city, because the city acted in its governmental capacity in terminating the plaintiff's employment:

> This board of fire and water commissioners, as well as all other heads of city governmental departments, in the matter of discharging or appointing an official or employee, cannot render the city responsible in any manner by reason of their wrongful acts. These officials and boards are, when so acting in the performance of the governmental functions, as distinguished from the proprietary functions, of the municipal corporation.

Gallagher, 7 S.W.2d at 715-716. See also State ex rel. Goldman v. Kansas City, 8 S.W.2d 620 (Mo. 1928) and Kithcart v. Kansas City, 8 S.W.2d 895 (Mo. 1928) for similar dispositions.

It is not insignificant to note that the employee in Gallagher worked for the city's water division, a function traditionally viewed as proprietary under Missouri law. See Junior College District of St. Louis v. City of St. Louis, 149 S.W.3d 442, 447 (Mo. banc 2004)(selling water to customers for profit or municipal revenue is a proprietary

function). While the Gallagher court did not address the immediate issue of an employment decision being made in the context of a proprietary activity, the Eighth Circuit has confronted and rejected the argument.

In Nichols v. City of Kirksville, 68 F.3d 245 (8th Cir. 1995), the plaintiff sued his employer for wrongful discharge (in retaliation for filing a workers' compensation claim) and argued that his job as a city mechanic provided a special benefit to the city and its residents, and therefore involved the exercise of a proprietary rather than a governmental function. The Eighth Circuit disagreed, relying on Gallagher:

> Even if we were to accept for the purposes of argument [plaintiff's] contentions, we could not agree with the conclusion that Mr. Nichols draws from them. *That is because the alleged wrongful act in this case is not something that Mr. Nichols did in his job but what the city did, i.e., firing him. Hiring and firing city employees are governmental, not proprietary, activities.*

Nichols, 68 F.3d at 247 (emphasis added).

The case of Aiello v. St. Louis Community College District, 830 S.W.2d 556 (Mo. App. 1992), also supports this conclusion. In Aiello an administrative assistant to the vice-chancellor of a community college brought suit against the school for wrongful discharge, claiming that she was fired in retaliation for objecting to the vice-chancellor's filing of false expense reports. The trial court dismissed the suit for failure to state a claim. After observing the traditional governmental-proprietary distinction, the Eastern District found that sovereign immunity applied because the vice-chancellor, as a school

administrator, was acting within the scope of his administrative duties while furthering a governmental function:

> Here, acts of the Vice-Chancellor and his staff, as school administrators, are clearly within the government side of the dichotomy. Plaintiff expressly states in her petition the acts alleged to be tortious were done within the scope of administrative duties of a school administrator. Their role is to carryout the governmental mandate for education within the context of the Junior College District. . . . There is no special benefit in this act, nor has plaintiff provided us with any reason to construe this act as proprietary.

Aiello, 830 S.W.2d at 558-559.

In the instant case the appellant alleges that the act alleged to be tortious—his discharge—was accomplished by the city manager within the scope of his administrative authority over the City's personnel, but as a matter of law, such decisions are governmental in nature. Gallagher, Nichols, Aiello, *supra*. As such the appellant failed to establish that the City was not protected by sovereign immunity, and he failed to state a claim.

2. Operating a Municipal Department is a Governmental Function

On this record, Amici cannot state whether the Olivette Public Works Department performs proprietary or governmental activities—likely it is a mix of both—but the characterization of the activities performed by the department is not relevant, as the Appellant's injury did not occur in the context of any of the activities so performed.

Rather the Appellant's injury occurred due to the City's management of its public works department, see Gallagher, Nichols, and Aiello, *supra*, and the function of managing a municipal department, even one that performs proprietary activities, is a governmental activity.

The distinction between the administration of a municipal department (governmental) and work that department actually performs (proprietary) can be illustrated by examining those Missouri cases characterizing municipal activity as "proprietary." In each case the plaintiff sustained an injury as the result of the city's alleged negligent in performing a particular *job*. For example, in Junior College District of St. Louis v. City of St. Louis, 149 S.W.3d 442, 447 (Mo. banc 2004), this Court denied immunity when the city's failure to locate a shut-off valve used in the sale and delivery of water (a proprietary function) was alleged to have caused flooding and property damage. *Id.* In Counts v. Morrison-Knudsen, 663 S.W.2d 357, 363 (Mo. App. 1984), the Southern District denied immunity when the city's construction of a power plant, another proprietary function, led to injury. See also Matthews v. City of Farmington, 828 S.W.2d 693, 695 (Mo. App. 1992)(no immunity when city's negligence in delivering electricity to customers caused a fire).

In the instant case the Appellant was not injured because of the negligent performance of a particular proprietary function; he was terminated in the course of the city's *administration* of a municipal department that happens to perform both governmental and proprietary functions. The distinction is critical.

Amici are unaware of any case specifically addressing the difference between the administration of a municipal department and performance by that department of a proprietary activity, but in Counts v. Morrison-Knudsen, 663 S.W.2d 357, *supra*, the Southern District touched on the issue. The court was presented with the question of whether the construction of a municipal power plant, which was to be used in the proprietary capacity of selling power, was itself a proprietary function. In discussing an older case on sovereign immunity, that of Donahew v. City of Kansas City, 38 S.W. 571 (Mo. 1897), the court found that it was, but its discussion of Donahew is instructive:

> In Donahew the court pointed out that ordinarily there are many preliminary questions to be settled before the details of any public work can be arranged. These questions concern the expediency of doing the proposed work and "the general manner" in which it shall be done. *On these and similar questions the city acts in its governmental capacity and "until they are settled, and some specific work is decided upon, the legal obligation to exercise care is not brought to life."* Donahew, 38 S.W. at p. 573. Significantly the court then said:
>
> "But as soon as the corporation has determined to construct a public work, it enters upon an undertaking which, in all its details, should be subordinated to the rule requiring the use of care, for the work is then ministerial."

Counts, 663 S.W.2d at 362.

The Donahew authority supports the conclusion that a city acts in its governmental capacity when involved in administration, and in its proprietary capacity *only* when the administrative process results in the performance of an activity that benefits the city's assets or treasury.

The instant case exemplifies this principle. Appellant claims he was fired in retaliation for his insistence, as a department head and in the scope of his managerial authority, that the Olivette City Council and city manager comply with purported legal requirements ensuring the disabled access to public buildings and requiring the repair of a deteriorated bridge and the provision of a safe work environment for city employees. These complaints were made by the appellant for the presumed purpose of bringing the City into compliance with the alleged deficiencies. After receiving this information the City could consider whether modifications and repairs needed to be made, whether the City had money to address the problems raised (and in what order), and if so, how and when the work would be performed. These administrative, legislative, and policy considerations (governmental) would have to be addressed before any of the proposed modifications or repairs (proprietary) could be performed.

Indeed, the respective roles of the Appellant and the City in this process are the very stuff of government. The action of a department head advising his employers on how to better a municipality's physical assets, for the benefit of the disabled, the traveling public, and its own employees, is nothing if not action taken "for the common good of all." And the process of responding to that information and reaching a determination to make any needed improvements is a role reserved exclusively to the City's administrative

and legislative authority. Local governments exist only to provide local services, local infrastructure, and local resources to the general public. This administrative process, and the ancillary management of employees in the course of its operation, is not undertaken for any "special benefit or profit" inuring to the City; rather it is performed for the "good of all."

Missouri case law compels the conclusion that the City acted in its governmental capacity in discharging the Appellant, and as such he has failed to state a claim that avoids the bar of sovereign immunity.

CONCLUSION

The termination of an employee is part of the management of the government's work force—a function essential to the operation of any local government—and constitutes a governmental activity. The administration of a municipal department is a process governmental in nature, regardless of whether the department actually engages in proprietary activities. The Appellant has not alleged any facts or submitted any law to the contrary, nor has he suggested any reason why his termination should be considered proprietary. As such, the Appellant has failed to establish that the City was not protected by sovereign immunity, and he failed to state a claim.

Amici respectfully submit that the trial court did not err in dismissing the appellant's retaliatory discharge claim, because the City acted in its governmental capacity, and that dismissal should be affirmed.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies as counsel of record for respondent that respondent's brief includes all information required by Rule 55.03, that the brief complies with the limitations contained in Rule 84.06(b), that the word count for this brief is 3,320 per Microsoft Word 2003 and that the diskette provided to the court and to the respondent has been scanned for viruses and is free of same.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one true and correct copy of the foregoing Brief of Amici Curiae and one diskette containing said brief in Microsoft Word format was mailed first class, postage prepaid, this 10th day of October 2005, to Donald K. Murano, Guinness, Buehler, & Murano, LLC., 415 North Second Street, St. Charles, MO 63301, Attorney for Appellant and James N. Foster, Jr., William B. Jones, and Corey L. Franklin, McMohan, Berger, Hanna, Linihan, Cody & McCarthy, 2730 North Ballas Road, Suite 200, P.O. Box 31901, St. Louis, MO 63131-3039, Attorneys for Respondent.

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